U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 26 February 2004

Case No.: 2002-BLA-5443

In the Matter of

CLYDE WARD
Claimant

v.

SOUTHERN OHIO COAL COMPANY
Employer

CONSOL ENERGY INC.
Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-Interest

APPEARANCES:

Otis R. Mann, Jr., Esquire
For the claimant

Ashley Harman, Esquire
For the employer/carrier

BEFORE: JOSEPH E. KANE
Administrative Law Judge

DECISION AND ORDER – AWARDING BENEFITS

This proceeding arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the Act). Benefits are awarded to coal miners who are totally disabled due to pneumoconiosis. Pneumoconiosis, commonly known as black lung, is a chronic dust disease of the lungs arising from coal mine employment. 20 C.F.R. § 718.201(a) (2001).

On July 16, 2003, a formal hearing was held in Athens, Ohio. The parties were afforded full opportunity to present evidence and argue at the hearing, as provided in the Act and the regulations issued thereunder. The Findings of Fact and Conclusions of Law that follow are based upon my analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties has been carefully reviewed and thoughtfully considered. While the contents of certain medical evidence may appear inconsistent with the conclusions reached herein, the appraisal of such evidence has been conducted in conformance with the quality standards of the regulations.

The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title. The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title. References to DX, CX, EX and JX refer to the exhibits of the Director, claimant, employer and joint exhibits, respectively.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Procedural History

On May 9, 2001, Mr. Clyde Ward filed a subsequent claim for benefits under the Act. (DX 1). His initial claim, filed in March 1981, resulted in a denial of benefits in June 1981. (DX 1). In 1998, the Benefits Review Board upheld the Administrative Law Judge's denial due to a failure by Mr. Ward to establish the existence of a totally disabling pulmonary or respiratory impairment caused by pneumoconiosis. *Ward v. Southern Ohio Coal Co.*, BRB No. 98-0482 BLA (Dec. 18 1998). The Board also affirmed the finding of 28.5 years of coal mine employment. *Id.*

On May 17, 2002, the District Director issued a Proposed Decision and Order denying benefits for Mr. Ward on his subsequent claim.[1] (DX 23). Although the Director found that Claimant had established 28 years of coal mine employment; that he had pneumoconiosis caused, at least in part, by coal mine work; he did not find that Mr. Ward was totally disabled by a breathing impairment within the meaning of the Act. *Id.*

Threshold Issue for Subsequent Claims

Under the amended regulations of the Act, the progressive and irreversible nature of pneumoconiosis is acknowledged. 20 C.F.R. § 718.201(c). Consequently, claimants are permitted to offer recent evidence of pneumoconiosis after receiving a denial of benefits. *Id.* The new regulations provide that where a claimant files a subsequent claim more than one year after a prior claim has been finally denied, the subsequent claim must be denied on the grounds of the prior denial unless "the claimant demonstrates that one of the applicable conditions of entitlement has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. § 725.309(d). If a claimant establishes the existence of an element previously

[1] Where a claimant files another claim more than a year after a denial, the present claim is considered a subsequent claim. 20 C.F.R. § 725.309(d).

adjudicated against him, only then must the administrative law judge consider whether all the evidence of record, including evidence submitted with the prior claim, supports a finding of entitlement to benefits. *Id.* A duplicate claim will be denied unless the claimant shows that one of the applicable conditions has changed since the date of the previous denial order. *Id; see, also Sharondale Corp. v. Ross*, 42 F.3d 993, 997-998 (6th Cir. 1994).

Accordingly, because the District Director denied the previous claim, Mr. Ward now bears the burden of proof to show that an element of the applicable conditions of entitlement has changed. 20 C.F.R. § 725.309(d). I must review the evidence developed and submitted subsequent to December 18, 1998, the date of the prior denial, to determine if he meets this burden. *Id.*

The following element was deemed not shown by Mr. Ward as a result of the initial denial: He is totally disabled due to pneumoconiosis. 20 C.F.R. § 410.410(b); (DX 1). Failure to establish this element will result in denial of the claim. *Hall v. Director*, *OWCO*, 2 B.L.R. 1-1998 (1980).

Factual Background

Mr. Ward, born on December 7, 1931, is 72 years old, has a sixth grade education and is currently a non-smoker. (DX 2). He smoked one-half pack of cigarettes for approximately 30 years but quit smoking thirty years ago. (TR at p. 20). He claims one dependent, his wife Angeline Ward, to whom he has been married for 53 years. (DX 2, TR at p. 13). All of his employment took place underground in the coal mines. (TR. at 15). He worked shoveling coal and as a belt man moving rollers and greasing belt drives. (TR. at p. 15-17). He regularly lifted 50 to 75 pounds and did a lot of bending and stooping. *Id.* Mr. Ward contends that he worked 28 years in the Nation's coal mines. I concur and make the specific finding of 28 years of coal mine employment.

Medical Evidence

Medical evidence submitted with a claim for benefits under the Act is subject to two different requirements. First, medical evidence must be in "substantial compliance" with the applicable regulations' criteria for the development of medical evidence. *See* 20 C.F.R. § 718.101 to 718.107. The regulations address the criteria for chest x-rays, pulmonary function tests, physician reports, arterial blood gas studies, autopsies, biopsies and "other medical evidence." *Id.* "Substantial compliance" with the applicable regulations entitles medical evidence to probative weight as valid evidence.

Secondly, medical evidence must comply with the limitations placed upon the development of medical evidence. 20 C.F.R. § 725.414. The regulations provide that claimants are limited to submitting no more than two chest x-rays, two pulmonary function tests, two arterial blood gas studies, one autopsy report, one biopsy report of each biopsy, and two medical reports as affirmative proof of their entitlement to benefits under the Act. § 725.414(a)(2)(i). Any chest x-ray interpretations, pulmonary function test results, arterial blood gas study results, autopsy reports, biopsy reports, and physician opinions that appear in one single medical report must comply individually with these evidentiary limitations. *Id.* In rebuttal to evidence propounded

by an opposing party, a claimant may introduce no more than one physician's interpretation of each chest x-ray, pulmonary function test, or arterial blood gas study. § 725.414(a)(2)(ii). Likewise, the district director is subject to identical limitations on affirmative and rebuttal evidence. § 725.414(a)(3)(i-iii).

The parties submitted a Joint Stipulation of Objective Evidence at the formal hearing. (JX 1). The exhibit lists 30 x-ray interpretations, dating from 1981 to May of 2003, ten pulmonary function studies, six arterial blood gas studies, and twenty-five medical reports or other medical evidence. Of significance are the twenty-two x-ray interpretations conducted since the date of the last denial of benefits. Clearly, the parties do not understand the limitations placed on the submission of evidence under the new regulations in effect as of January 19, 2001, and as discussed *supra*. The parties also failed to submit the Evidence Summary Form provided by the Department of Labor Office of Administrative Law Judges. Consequently, I found that the medical evidence as listed in the Joint Stipulation Form violates the evidentiary limitations at 20 C.F.R. § 725.414 and issued a Show Cause Order on February 4, 2004 directing the parties to re-submit their respective forms within the limitations under § 725.414. Both parties returned their respective forms; however, the Employer continues to include evidence in excess of that permitted under the regulations. Discussion of the admissibility of the submitted items will be held under each applicable section, *infra.*

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To permit evidence that was inadmissible at the threshold stage for subsequent claims to be admitted for consideration at the *de novo* stage would provide an end run around the evidentiary limitations. The effect of this interpretation would result in the new limitations applying only to initial claims. This was not the goal behind the drafters of the new regulations. Instead, the purpose is to even the playing field between the parties and to put the focus on quality of evidence rather than quantity of evidence. Consequently, evidence post-dating the last denial will be excluded unless it is within the limitations at § 725.414.

Total Disability Due to Pneumoconiosis

A miner is considered totally disabled when his pulmonary or respiratory condition prevents him from performing his usual coal mine work or comparable work. 20 C.F.R. 718.204(b)(1). Under section 718.204(b)(2), there are several criteria for establishing total disability and the applicable criteria under these facts are: by qualifying pulmonary function tests or arterial blood gas studies and by a physician's reasoned medical judgment based on medically acceptable clinical and laboratory diagnostic techniques.[2] 20 C.F.R. 718.204(b)(2)(i) and (iii). I

[2] Section 718.204(b)(2)(iii) provides that a claimant may prove total disability through evidence establishing cor pulmonale with right-sided congestive heart failure. This section is inapplicable to this claim because the record contains no such evidence.

must first evaluate the evidence under each subsection and then weigh all of the probative evidence together, both like and unlike, to determine whether claimant has established total respiratory disability by a preponderance of the evidence. *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1987).

Pulmonary Function Tests

All pulmonary function study evidence must be weighed including testing done both pre- and post-bronchodilator administration. *Sturnick v. Consolidation Coal Co.*, 2 B.L.R. 1-972 (1980), *Coen v. Director, OWCP*, 7 B.L.R. 1-30 (1984). However, little or no weight may be accorded to a ventilatory study where the miner exhibited "poor" cooperation or comprehension. *Houchin v. Old Ben Coal Co.*, 6 B.L.R. 1-1141 (1984). To be qualifying, the FEV_1 as well as the MVV or FVC values must equal or fall below the applicable table values. *Tischler v. Director, OWCP*, 6 B.L.R. 1-1086 (1984). I must determine the reliability of a study based upon its conformity to the applicable quality standards, *Robinette v. Director, OWCP*, 9 B.L.R. 1- 154 (1986), and must consider medical opinions of record regarding reliability of a particular study. *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). In assessing the reliability of a study, I may accord greater weight to the opinion of a physician who reviewed the tracings. *Street v. Consolidation Coal Co.*, 7 B.L.R. 1-65 (1984). Because tracings are used to determine the reliability of a ventilatory study, a study, which is not accompanied by three tracings, may be discredited. *Estes v. Director, OWCP*, 7 B.L.R. 1-414 (1984). If three tracings accompany a study, then I may presume that the study conforms unless the party challenging conformance submits a medical opinion in support thereof. *Inman v. Peabody Coal Co.*, 6 B.L.R. 1-1249 (1984).

Pulmonary Function Studies[3]

Exhibit/Date	**Physician**	**Age/ Height**	**FEV_1**	**FVC**	**MVV**	**FEV_1/ FVC**	**Tracings**	**Comments**
DX 8 06/24/99	Morgan	67/71"	2.05	3.14		44 %	Yes	Moderate obstruction, poss. restrictive defect
DX 8 10/29/99	Morgan	67/71"	2.09	3.71		56 %	Yes	Moderate obstruction
DX 8 01/26/01	Morgan	69/69"	1.08	3.20		33.8 %	Yes	Severe obstruction

[3] Because the physicians conducting pulmonary function studies noted varying heights, I must make a finding on the Miner's height. *See Protopappas v. Director, OWCP*, 6 B.L.R. 1-221, 1-223 (1983). Based on the average of the heights noted in the entire record, I find the Miner's height to be 69.1 inches.

DX 12 07/12/01	Gaziano	69/67"	2.32	4.63	78	50 %	Yes	Not noted
EX 3 09/04/02	Zaldivar	70/68"	2.25 2.26	4.00 4.42		56 % 51 %	Yes (pre) Yes (post)	Not noted
CX 2 05/20/03	Rasmusse n	71/68"	2.03 2.22	3.93 4.18	77	52 % 53 %	Yes (pre) Yes (post)	Min. slightly reversible obstr. Ventilatory impairment, diffusing cap. Moderately reduced
EX 31 10/02/03	Bellott	71/68"	2.02 2.18	3.64 3.92	64 72	55% 56%	Yes (pre) Yes (post)	Great effort and coop, mild impairment, mild reversible obstructive ventilatory impairment

Turning to the evidence, the studies are all accompanied by three tracings, have not been challenged for non-conformity, and will, therefore, be presumed valid. The studies above did not produce qualifying results[4] under 20 C.F.R. § 718.204(b)(2)(i)(A), (B) or (C). Accordingly, I find they present probative evidence weighing against a finding that Claimant is totally disabled.

Arterial Blood Gas Studies

All blood gas study evidence of record must be weighed. *Sturnick v. Consolidation Coal Co.*, 2 B.L.R. 1-972 (1980). This includes testing conducted before and after exercise. *Coen v. Director, OWCP*, 7 B.L.R. 1-30 (1984); *Lesser v. C.F. & I. Steel Corp.*, 3 B.L.R. 1-63 (1981). In order to render a blood gas study unreliable, the party must submit a medical opinion that a condition suffered by the miner, or circumstances surrounding the testing, affected the results of the study and, therefore, rendered it unreliable. *Vivian v. Director, OWCP*, 7 B.L.R. 1-360 (1984).

Exhibit	**Date**	**Physician**	**pCO_2**	**pO_2**	**Resting/ Exercise**	**Comments**
DX 11	07/12/01	Gaziano	32	97	Resting	
EX 3	09/04/02	Zaldivar	33	104	Resting	

[4] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values found in Appendices B and C of Part 718. *See* 20 C.F.R. § 718.204(b)(2)(i) and (ii). A "non-qualifying" test produces results that exceed the table values.

Exhibit	Date	Physician	pCO_2	pO_2	Resting/ Exercise	Comments
CX 2	05/20/03	Rasmussen	30.0	81.0	Resting	Significant metabolic acidosis w/assoc hyperventilation, obstructive vent. impairment, diffusing capacity moderately reduced
EX 21	10/02/03	Bellotte	35	87	Resting	Normal at rest

The record contains four arterial blood gas studies. The reports indicate no contradiction of the regulatory quality standards, and consequently, I accord each blood gas probative weight on the issue of total disability. No study produced qualifying values. Thus, the preponderance of the arterial blood gas study evidence weighs against a finding of total disability.

Medical Summaries

Where a claimant cannot establish total disability under subparagraphs (b)(2)(i), (ii), or (iii), Section 718.204(b)(2)(iv) provides another means to prove total disability. Under this section, total disability may be established if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a respiratory or pulmonary impairment prevents the miner from engaging in his usual coal mine work or comparable and gainful work.

The weight given to each medical opinion will be in proportion to its documented and well-reasoned conclusions. A "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). A report may be adequately documented if it is based on items such as a physical examination, symptoms and patient's history. *See Hoffman v. B & G Construction Co.*, 8 BLR 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984); *Buffalo v. Director*, OWCP, 6 BLR 1-1164, 1-1166 (1984); *Gomola v. Manor Mining and Contracting Corp*., 2 BLR 1-130 (1979). A "reasoned" opinion is one in which the underlying documentation and data are adequate to support the physician's conclusions. *See Fields, supra*. The determination that a medical opinion is "reasoned" and "documented" is for this Court to determine. *See Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc).

The record contains the Employer submitted medical opinions of Drs. Zaldivar, and Bellotte with the proffered opinion of Dr. Spagnolo, the Director's report by Dr. Gaziano, the Claimant's submitted medical opinion of Drs. Rasmussen, as well as the treatment records of Dr. Morgan. The Employer's reports contain references to, and relied on, evidence submitted with Mr. Ward's prior claims. That evidence is not admissible where I must evaluate the evidence developed *subsequent to* the last decision to determine if the requisite element of entitlement is established in this duplicate claim. Under the regulations, a medical report "consist[s] of a

physician's written assessment of the miner's respiratory or pulmonary condition. A medical report may be prepared by a physician who examined the miner and/or reviewed the available **admissible evidence**." 20 C.F.R. § 725.414(a)(1) (emphasis added).

Under these new regulations, the Department of Labor seeks to limit the quantity of evidence submitted in black lung claims "to allow adjudication officers to resolve issues of eligibility based on the quality of the medical evidence developed by the parties rather than merely the quantity of evidence that parties with superior financial resources may be able to submit." 65 Fed. Reg. 79992 (Dec. 20, 2000). Although a party may exceed the limitations on demonstration of good cause, the Administrative Law Judge's authority to admit such evidence "does not obviate the more compelling need for a general rule limiting the amount of medical evidence that parties may submit in black lung benefits claims." *Id.* Consequently, because the reports of Drs. Bellotte, Zaldivar, and Spagnolo rely on evidence in excess of the evidentiary limitations, those reports are inadmissible and are excluded from consideration. To permit the Employer to "end run" around the evidentiary limitations would eviscerate the purpose behind the new rules.

Turning to the remaining medical reports, I find that the reports of Drs. Rasmussen and Gaziano, the treatment records of Dr. Morgan, and the treatment records from the Holzer Clinic are admissible. (CX 2, DX 10, DX 8, EX 1, respectively). Breton Morgan, M.D., served as treating physician for Mr. Ward for the period spanning the years 1995 to the present. (DX 8). His qualifications do not appear in the record. During these years, Dr. Morgan treated Mr. Ward for a variety of ailments including heart disease, diabetes, chest, back and leg pain, pneumoconiosis, blood clots, fatigue, renal disease, benign prostatic hypertrophy, emphysema and shortness of breath. *Id.* Dr. Morgan performed or ordered numerous diagnostic tests including chest x-rays, EKG's, stress tests, carotid ultrasound, pulmonary function testing and arterial blood gas studies over the years. In 2000, Mr. Ward underwent bypass surgery for his heart disease. The pulmonary function tests showed moderate impairment initially, but more recent tests revealed severe obstruction. No etiologies for the breathing impairments are listed and Dr. Morgan's treatment notes do not address disability.

Donald L. Rasmussen, M.D. provided an examining report and medical opinion of Mr. Ward, dated May 20, 2003. (CX 2). Dr. Rasmussen is board-certified in internal medicine and also forensic medicine and examination. He is a certified B-reader and highly-qualified, as well as, being a frequently published author. He examined Mr. Ward and conducted objective testing including an EKG, chest X-ray (1/1, t/t with a profusion through all lung zones), pulmonary function studies (minimal, slightly reversible obstructive ventilatory impairment, maximum breathing capacity minimally reduced, single breath carbon monoxide diffusing capacity moderately reduced), arterial blood gas testing (significant metabolic acidosis with hyperventilation due to renal insufficiency, moderate loss of respiratory function). A smoking history indicated one pack per day from the age of 16 and continuing thirty years. Dr. Rasmussen diagnosed pneumoconiosis based on the chest x-ray noting x-ray changes consistent with pneumoconiosis, and a significant history of coal dust exposure. Where a physician bases his conclusion of the presence of pneumoconiosis on x-ray, clinical findings and/or claimants years of work in the coal mines, the Benefits Review Board has held the opinion to be well-reasoned.

Bateman v. Eastern Associated Coal Corp., BRB No. 98-0997 BLA, slip op. at 3 (Sept. 30, 1999)(unpub.) (emphasis added)(footnote omitted).

As to the etiology of the pneumoconiosis, Dr. Rasmussen tendered the opinion that both cigarette smoking and coal dust exposure would cause injury to Mr. Ward's lung tissues, however, the coal dust was the major contributing factor. He also stated that Mr. Ward has chronic renal failure with secondary metabolic acidosis that is unrelated to the coal dust exposure. In sum, he opines that Mr. Ward does not possess the pulmonary function due to his moderate loss of respiratory function, as reflected by the reduced single breath carbon monoxide diffusing capacity and the spirometry tests, to perform his last "very heavy" manual labor coal mine employment. (CX 2).

The District Director arranged a complete pulmonary examination by Dominic Gaziano, M.D. on July 12, 2001. (DX 10). Dr. Gaziano's qualifications do not appear in the record. He recorded a work history (28.5 years, all underground), a smoking history (1/2 pack per day, quit in 1976), a physical examination, a chest x-ray (1/0), pulmonary function studies (moderate obstructive impairment), arterial blood gas tests (normal resting), and EKG (abnormal). Dr. Gaziano diagnosed coal worker's pneumoconiosis and arteriosclerotic heart disease, stating that the heart disease results in a severe impairment and the pneumoconiosis causes a moderate impairment. He tendered the opinion that Mr. Ward's impairments, assessed as severe, prevent him from returning to coal mine employment. (DX 10). The extent to which pneumoconiosis, a moderate impairment, affects the Miner's ability to return to his former coal mine position was not discussed in the report. The basis of Dr. Gaziano's label of "moderate" impairment due to pneumoconiosis appears in the record and is supported by the objective findings—specifically, the moderate obstructive impairment evidenced by the pulmonary function studies and a chest x-ray reading of "1/0" indicating pneumoconiosis.

Notably, the opinion appears to rely more upon the impact of the heart disease to reach the conclusion of total disability rather than upon the moderate obstructive impairment. Further, the doctor did not address whether cigarette smoking contributed to or caused the obstructive impairment he diagnosed, nor did he address whether the heart condition influenced the pulmonary symptoms in his report. However, during his deposition, Dr. Gaziano stated that Mr. Ward's respiratory impairment represented an impairment of almost fifty percent based on State occupational criteria, but using National standards, he would assess Mr. Ward with an impairment between a Class I and Class II, with Class I being no impairment. (EX 9, Depo. p. 18-19). Based on the MVV and $FEV_{1,}$ the doctor believes Mr. Ward could perform moderate work. (EX 9, Depo. p. 20). When asked to comment with a reasonable degree of medical certainty on the etiology of the obstructive impairment, Dr. Gaziano made the following statement:

> Answer: I believe that it's contributed to by coal worker's pneumoconiosis and possibly by cigarette smoking, but I can't completely exclude an asthmatic or reversible condition. (EX 9, Depo. p. 22-23).

On cross-examination, Dr. Gaziano reviewed the post-bronchodilator studies conducted by Dr. Zaldivar and, based upon this information, dr. Gaziano retracted his opinion regarding

asthma as a possible etiology due to the reversibility revealed after administration of the bronchodilator. (EX 9, Depo. at p. 23-25). Also on cross-examination, Dr. Gaziano stated that, due to the heavy work performed by Mr. Ward at his last coal mine position, he could not perform that work now due to the moderate impairment due to pneumoconiosis. (EX 9, Depo. at p. 26-27). On re-direct, the doctor stated that he favored the conclusion that coal mine employment, and not cigarette smoking, caused the impairment because of the relatively mild smoking history and the lapse of some thirty years since the miner last smoked. (EX 9, Depo. at p. 27-28). He testified that he based his diagnosis of pneumoconiosis on coal mine employment history, the pulmonary functional testing and chest x-ray. (EX 9, Depo. at p. 15). He also made the following statements:

> Question: You concluded that you thought this man's obstructive impairment was due to his occupational exposure.
>
> Answer: Yes, sir
>
> Question: Would you explain for me why you made that causal connection in this case?
>
> Answer: Well, I think there were two reason[s] for this kind of pattern, one of which is coal mine work and the other cigarette smoking. And I just said his cigarette smoking was relatively mild and, more importantly, quite remote. That's why I favor the coal mine employment as being the primary cause of his obstruction. (EX 9, Depo. at p. 27-28).

As to "total disability"[5], the general rule regarding medical opinions of disability is that the opinion need not be phrased in terms of "total disability" before total disability can be established. Instead, it is sufficient to list the impairments that prohibit the claimant from performing his usual coal mine work. *Black Diamond Coal Mining Co. v. Benefits Review Board*, 758 F.2d 1532, 7 BLR 2-209, 210 (11th Cir. 1985). At the very least, however, the evidence must be sufficient to allow a proper comparison between a miner's usual employment and his impairment. *See, Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 and 13 BLR 1-46 (1986) *aff'd on recon.*, 9 BLR 1-104 (1986)(en banc); *Mazgaj v. Valley Camp Coal Corp.*, 9 BLR 1-201 (1986); *cf. Hillibush v. United States Department of Labor*, 853 F.2d 197, 11 BLR 2-223 (3d Cir. 1988). It is claimant's burden of proof to establish the exertional requirements of his usual coal mine employment. *See, generally, Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *see also Cregger v. United States Steel Corp.*, 6 BLR 1-1219 (1984).

In *Budash,* the Benefits Review Board reversed the Administrative Law Judge's finding that a medical report was irrelevant to the issue of total disability. 9 BLR 1-48, 1-51. Where the report did not discuss whether the diagnosed "Class II" respiratory impairment would prevent the miner from performing his past coal mine work, the Administrative Law Judge found it irrelevant. *Id.* The Benefits Review Board, however, held the report relevant to the issue of disability and, furthermore, held that a medical report "only needs to describe either the severity of the impairment…sufficiently so that the administrative judge can infer that claimant is totally disabled." *Id.*; *Wright v. Director*, 8 BLR 1-245 (1984). On remand, the BRB ordered the Administrative Law Judge to discuss the doctor's impairment rating with the claimant's usual exertional requirements to determine whether the miner had established total disability. *Id.* at 1-52.

Likewise, in *Black Diamond Coal Mining Co. v. Benefits Review Board*, the Eleventh Circuit rejected an employer's argument that a doctor's opinion did not establish a totally disabling impairment sufficient to invoke the presumption. 758 F.2d 1532, 7 BLR 2-209, 210 (11th

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[5] Twenty CFR 718.204 states:

> (c)(1) Total disability due to pneumoconiosis defined. A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in Sec. 718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a ``substantially contributing cause'' of the miner's disability if it:
>
> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
>
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.
>
> (2) Except as provided in Sec. 718.305 and paragraph (b)(2)(iii) of this section, proof that the miner suffers or suffered from a totally disabling respiratory or pulmonary impairment as defined in paragraphs (b)(2)(i), (b)(2)(ii), (b)(2)(iv) and (d) of this section shall not, by itself, be sufficient to establish that the miner's impairment is or was due to pneumoconiosis. Except as provided in paragraph (d), the cause or causes of a miner's total disability shall be established by means of a physician's documented and reasoned medical report.

Cir. 1985). The Employer argued that since the doctor did not discuss the employment requirements and did not place limitations on lifting and carrying, then the medical opinion did not amount to evidence of "work-precluding" disability. *Id.* at 2-210. The Court held to the contrary, ruling that the Administrative Law Judge could draw an inference from the doctor's report that the claimant was totally disabled. *Id.*

Turning to the facts of the instant case, *Black Diamond* permits a medical opinion to provide evidence of total disability even though the physician did not discuss the claimant's work requirements. Under *Budash,* I am permitted to compare the exertional requirements of the claimant's usual coal mine work with the impairments contained in Dr. Gaziano's report. (EX 9, Depo. at p. 26-27). Of significance is the deposition testimony of Mr. Ward's exertional requirements at his previous employment:

> Question: You did indicate that you believe that, number one, he had coal workers' pneumoconiosis—
>
> Answer: Yes, sir.
>
> Question: --and that you felt that as a result of that he had a moderate impairment?
>
> Answer: Yes, sir.
>
> Question: Now you further indicated that you did not believe that he could do heavy to very heavy work.
>
> Answer: That's correct.
>
> Question: Let me ask you just one hypothetical question, Doctor. In Answer to Interrogatories propounded by the employer, he [Ward] noted that his last coal mine job was shovel coal on a belt line and that he stood for eight hours, lifting fifty pounds for eight hours, shoveled up to fifty pounds of coal on a belt line for eight hours a day. Do you—Would that be, in your opinion, heavy work?
>
> Answer: I believe that's heavy work, yes, sir.
>
> Question: And that kind of work he would be prohibited form doing because of his pulmonary condition related to his coal dust exposure or his coal workers' pneumoconiosis?
>
> Answer: Yes, sir.
>
> Question: And do you find that within a reasonable degree of medical certainty?

Answer: Yes, sir. (Ex 9, Depo. at p. 26-27).

Comparing Mr. Ward's performance of heavy manual underground labor and the physician's assessment of a claimant's respiratory impairment, I may properly infer that the claimant is totally disabled where I find Dr. Gaziano's opinion is well reasoned, well documented and, therefore, probative as to total disability.

However, Section 901(a) of the Black Lung Act states that a miner is entitled to benefits only if he is "totally disabled due to pneumoconiosis." 30 U.S.C. § 901(a). The Sixth Circuit addressed the issue of the needed causation entrenched in the "due to" terms in *Adams v. Director, OWCP,* 886 F.2d 818, 825 (6th Cir. 1989). The Court held that a miner need only show that his total disability is due "at least in part" to his pneumoconiosis. 886 F.2d at 825. Thus, a miner need not show total disability by pneumoconiosis "in and of itself." *Id.* Subsequently, the Sixth Circuit further refined the standard in *Peabody Coal v. Smith*. 127 F.3d 504, 506-507 (1997). In that case, the Court determined that a miner must show more than a "de minimis or infinitesimal" contribution of pneumoconiosis to total disability. 127 F.3d 507. Rejecting the higher standard of "contributing cause" as used in the Third and Eleventh Circuits, the Court held:

> [A] miner must affirmatively establish that pneumoconiosis is a contributing cause of some discernable consequence of his totally disabling respiratory impairment. The miner's pneumoconiosis must be more than merely a speculative cause of his disability." *Id.*

Where both physicians diagnosed Mr. Ward with moderate respiratory impairments due to pneumoconiosis, caused by coal dust exposure, then Mr. Ward has met the standard as announced in *Adams* that his total disability is due "at least in part" to his pneumoconiosis. 886 F.2d at 825. Additionally, I note that in *Wisniewski v. Director, OWCP*, 929 F.2d 952 (3d. Cir. 1991), the court held that an inference that the miner's pneumoconiosis was caused by coal dust exposure may be raised "if the record [affirmatively] indicates [that there was] no other potential dust exposure." In consequence, I find that Dr. Gaziano's and Dr. Rasmussen's opinions support a finding that Mr. Ward is totally disabled due to pneumoconiosis where both opinions are well reasoned, well documented, supported by objective testing and include the requisite comparisons between the exertional requirements of the miner's last employment with his current respiratory impairments.

Also appearing in the record are the treatment records from the Holzer Clinic. (EX 1). On July 31, 2000, Suzanne Mize, M.D., examined Mr. Ward in preparation for surgery to remove a tumor. During her examination, she noted that Mr. Ward had no complaints of shortness of breath or cough and that his lungs were clear but she did not engage in any relevant objective tests. While an administrative law judge is not required to accept evidence that he determines is not credible, he nonetheless must address and discuss all of the relevant evidence of record. *See McCune v. Central Appalachian Coal Co.*, 6 BLR 1-966 (1984). Where the purpose of this visit, as referred by Mr. Ward's treating physician, was to conduct a pre-surgical

examination for excision of a tumor, I do not find that these notations rebut the findings and opinions of the other examining physicians.

I find that Mr. Ward has established an element of entitlement previously adjudicated against him, total disability due to pneumoconiosis, and as such, I must now consider whether all the evidence of record, including evidence submitted with the prior claim, supports a finding of entitlement to benefits. 20 C.F.R. § 725.309(d); *Sharondale Corp. v. Ross*, 42 F.3d 993, 997-998 (6th Cir. 1994).

De Novo Review of the Record

The Court in *Tennessee Consolidated Coal Co. v. Director, OWCP [Kirk]*, held that it is insufficient for the Administrative Law Judge to merely analyze the newly submitted evidence to determine whether an element previously adjudicated against the claimant has been established. 264 F.3d 602 (6th Cir. 2001). Rather, the court stated that the Administrative Law Judge must compare the sum of the newly submitted evidence against the sum of the previously submitted evidence to determine whether the new evidence "is substantially more supportive of claimant." *Id.* The Sixth Circuit interpreted the amended provisions at 20 C.F.R. § 718.204(c) (2000), which provides that pneumoconiosis is a "substantially contributing cause" to the miner's total disability if it:

> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. § 718.204(c) (2000).

The court stated that the Administrative Law Judge must compare the sum of the newly submitted evidence against the sum of the previously submitted evidence to determine whether the new evidence "is substantially more supportive of claimant." *Id.* Although the Administrative Law Judge did not conduct a comparison of the old and new evidence to determine whether the new evidence was "substantially more supportive," the Court in *Kirk*, nevertheless, affirmed the finding of "material change" as supported by the record as a whole. *Id.*

If the Claimant in the instant case cannot establish this “material change in condition” as defined by the Sixth Circuit, then principles of *res judicata* apply and the claim must be denied. *Sharondale* at 997-998. It is legal error for an Administrative Law Judge not to show that there was a worsening of Claimant’s condition on the element selected to show a material change. *Kirk*, 264 F.3d 602. The Claimant must show that the sum of the newly submitted evidence is “substantially more supportive” than the sum of the original evidence submitted with the recent claim. *Id.*

For purposes of this discussion, I will incorporate the medical evidence as stated in the administrative law judge’s opinion at *Ward v. Southern Ohio Coal Co.*, 95-BLA-1666 (Dec.1,1997). I also note that the Benefits Review Board affirmed the administrative law judge’s findings of length of employment and pneumoconiosis under 20 C.F.R. § 718.202(a)(1)

and § 718.203(b) because the Employer did not challenge these on appeal.[6] BRB No. 98-0482 BLA at p. 2, FN 1.

Pulmonary Function Studies

Exhibit/ Date	Physician	Age/ Height	FEV_1	FVC	MVV	FEV_1/ FVC	Tracings	Comments
DX 24 4/1/81	(Illegible)	49/71"	3.16	4.55	53	71%	Yes	Not noted.
DX 7 5/31/94	Linder	62/71"	2.36	3.96	38	59%	Yes	Good cooperation, comprehension. Mild obstructive impairment; flow volume loop suggests poor effort.
DX 18 12/14/94	Sundaram	63/71"	2.28 2.46*	3.04 3.54*	50.5 53.8*	75% 69%*	Yes	Not noted.
EX 1 3/26/96	Adamo	64/70"	2.83 2.81*	4.48 4.63*	52 67*	63% 61%*	No	Mild obstructive impairment with disproportionately reduced MVV which may be effort-related.

*denotes testing after administration of bronchodilator

Arterial Blood Gas Studies

Exhibit	Date	Physician	pCO_2	pO_2	Resting/ Exercise
DX 24	4/1/81	(Illegible)	34	107	Resting
DX 9	5/31/94	Linder	35.4	97.6	Resting
			34.8	98.2	Exercise

[6] Under 20 C.F.R. § 725.309(d)(4):

> If the claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue (see Sec. 725.463), shall be binding on any party in the adjudication of the subsequent claim.

Exhibit	Date	Physician	pCO_2	pO_2	Resting/ Exercise
EX 1	3/26/94	Boes	38.6	96.2	Resting
			38.8	88	Exercise

Narrative Medical Evidence

Dr. Harold E. Linder examined Claimant on behalf of the Department of Labor on May 31, 1994. During this examination, Dr. Linder reviewed Claimant's symptoms and histories, conducted a physical examination, and administered a chest x-ray, pulmonary function study, and arterial blood gas study. He reported that Claimant smoked one pack of cigarettes per day from the 1950's to 1988. He interpreted the chest x-ray as negative for pneumoconiosis, the pulmonary function study as reflecting mild obstruction, the arterial blood gas study as normal, and the stress test as "submaximal with poor effort." Dr. Linder noted that Claimant's pulmonary function study reflected "clearly poor effort". Based on this information, he diagnosed a mild obstruction and mitral valve prolapse syndrome. However, he believed that the mild obstruction likely was due to poor effort. Dr. Linder concluded that Claimant "has little evidence of any impairment" but that a maximal stress test would have provided a clearer assessment. (DX 1 at DX 8).

Raghu Sundaram, M.D., examined Claimant on December 14, 1994. During this examination, Dr. Sundaram reviewed Claimant's symptoms and histories, conducted a physical examination, and administered a chest x-ray and pulmonary function study. He reported that Claimant had "prolonged exposure to coal dust" and quit smoking eight years before the examination. He interpreted the chest x-ray as positive for pneumoconiosis and believed that this condition arose from prolonged exposure to coal dust. Dr. Sundaram opined that Claimant does not have the pulmonary capacity to perform his usual coal mine work or comparable work "[d]ue to shortness of breath with limited activity." (DX 1, DX 18).

Dr. Thomas J. Boes examined Claimant on September 9, 1996. Dr. Boes reviewed Claimant's symptoms and histories, conducted a physical examination, and administered a chest x-ray, pulmonary function study, and arterial blood gas study. He reported that Claimant worked as a coal miner from 1950 to 1964 and from 1975 to 1993. Dr. Boes also noted that Claimant had smoked cigarettes intermittently for thirty-four years. He interpreted the chest x-ray as negative for pneumoconiosis, the pulmonary function study as reflecting a mild obstructive impairment, and the arterial blood gas study as normal. Because Claimant had a normal vital capacity, total lung capacity, and gas exchange, Dr. Boes could "exclude an intrinsic interstitial lung disorder."

Dr. Boes also reviewed the tracings from Claimant's pulmonary function study dated in 1985 and concluded that this study reflected poor effort. Based on this information, he diagnosed a mild obstructive impairment consistent with chronic obstructive pulmonary disease. He believed that this condition "would most likely be secondary to the prior history of tobacco abuse." Dr. Boes attributed all of Claimant's symptoms to the chronic obstructive pulmonary disease and found them to be mild and intermittent at best. He opined that Claimant's symptoms,

physical examination findings, and objective studies "would not meet the criteria for impairment/disability from a pulmonary standpoint." Based upon Claimant's x-ray and other objective findings, Dr. Boes found "no evidence of pneumoconiosis or other interstitial lung disorder." (EX 1) Dr. Boes is certified by the American Board of Internal Medicine and the American Board of Medical Examiners and has a subspecialty in critical care medicine. (DX 1, EX 2).

The prior record reflects non-qualifying pulmonary function studies and arterial blood gas tests, as is the case with the newly submitted evidence. However, the report by Dr. Lindner revealed test results indicating a mild obstruction due however, the doctor opined that this was due to poor effort. Dr. Lindner reported little evidence of any impairment. Dr. Boes reported normal blood gas tests, but non-qualifying pulmonary function studies indicated a mild obstructive impairment consistent with mild COPD--most likely due to claimant's prior smoking habit. He opined that Mr. Ward was not disabled from a pulmonary standpoint. Lastly, Dr. Sundaram stated that Mr. Ward was impaired from a pulmonary impairment and unable to perform his usual coal mine employment due to shortness of breath with limited activity. He failed to conduct a blood gas study but relied on the pulmonary function tests results with less than 80% of the predicted values.

The Board held that Dr. Lindner's belief that the objective tests were not indicative of Mr. Ward's best efforts, and therefore not probative, was credible. Additionally, the Board held that a mild impairment did not support a finding of total disability; that Dr. Sundaram's opinion was poorly reasoned and, that even if it were well reasoned, Dr. Boes' opinion outweighed Dr. Sundaram's opinion due to his superior qualifications. *Supra,* p. 4.

After a review of the newly submitted evidence and the record previously admitted, I find that the Claimant has shown a material worsening of his condition since his last application and denial of benefits. Previously, Mr. Ward's pulmonary function studies, arterial blood gas tests, and medical opinion evidence revealed only a "mild" impairment or obstruction if any.[7] (DX 1, 18). In contrast, all recent examining physicians' opinions of record conclude that Mr. Ward's impairment, upgraded to moderate, indicates a substantial change or a "worsening" of Claimant's condition. *See, Kirk, infra.*

Therefore, under *Kirk*, I find the previously submitted evidence was not supportive of a finding of total disability, but the sum of the newly submitted evidence is supportive. Further, I find that the new evidence shows a material worsening of the miner's condition and, consequently he has met his burden under § 725.309(d) and has established a material change resulting in the establishment of all elements of entitlement to benefits under the Act.

Consequently, review of the record *de novo* follows to determine if Claimant meets all the elements of entitlement to benefits under the Act.

[7] None of the newly submitted or the previously submitted pulmonary function studies or arterial blood gas tests produced valid, qualifying results.

Newly Submitted X-ray Reports

At this stage of the analysis, I must also determine if the newly submitted x-ray reports comport with the limitations under 20 C.F.R. § 725.414. Claimant submits the x-ray interpretation of Dr. Cappiello as rebuttal. However, Dr. Cappiello's interpretation of an x-ray taken September 4, 2002, does not serve to rebut an x-ray admitted by either the District Director or the Employer. Under Section § 725.414(a)(2)(ii) and (3)(ii)(2001), a party may only rebut an interpretation placed into the evidence by an opposing party. Therefore, Dr. Cappiello's interpretation will not be admitted. The same is true of Employer's submission of three rebuttal x-ray interpretations by Dr. Wiot for x-rays not put into evidence by an opposing party. Consequently, I admit only Dr. Wiot's rebuttal interpretation of the x-ray submitted by the Director. Employer also proffers nine other interpretations in excess of the limitations that I exclude from consideration.

The evidence summary forms submitted after my Show Cause Order dated February 4, 2004 include the remaining admissible reports:

Newly Submitted X-ray reports

Exhibit	**Date of X-ray**	**Date of Reading**	**Physician/ Qualifications**	**Interpretation**
CX. 3	05/20/03	05/20/03	Patel – BC/B-reader	1/1, t/t
CX 3	05/20/03	08/19/03	Miller – BC/B-reader	1/0, p/p
EX 21	10/02/03	10/02/03	Bellotte – B-reader	Negative
EX 23	05/20/03	10/29/03	Spitz – BC[8]	Negative, scattered calcified granulomas
DX 14	07/21/01	07/21/01	Gaziano – B-reader	1/0, q/q
EX 13R	07/21/01	04/19/03	Wiot – BC/B-reader	Negative

Previous X-ray reports

Exhibit	**Date of X-ray**	**Date of Reading**	**Physician/ Qualifications**	**Interpretation**
DX 24	4/1/81	4/11/81	Cole BCR/BR	Pneumoconiosis, 1/0.
DX 10	5/31/94	7/26/94	Gaziano BR	Negative for pneumoconiosis.

[8] Employer asserts that Dr. Spitz is a B-reader, however, I take judicial notice that his B-reader certification expired in 2001 and was not in effect at the time of his reading. *See* http://www.oalj.dol.gov/public/blalung/refrnc/bread3.htm (last visited 2/18/04).

Exhibit	Date of X-ray	Date of Reading	Physician/ Qualifications	Interpretation
DX 18	12/14/94	12/15/94	Reddy	Pneumoconiosis, 1/1.
EX 1	3/26/96	3/26/96	Boes	Negative for pneumoconiosis.

DISCUSSION AND APPLICABLE LAW

Claimant must establish by a preponderance of the evidence that he has pneumoconiosis, that his pneumoconiosis arose from coal mine employment, that he is totally disabled, and that his total disability is due to pneumoconiosis. Failure to establish any of these elements precludes entitlement to benefits. *See Anderson v. Valley Camp of Utah*, Inc., 12 BLR 1-111, 1-112 (1989).

Pneumoconiosis and Causation

Section 718.202 provides four means by which pneumoconiosis may be established: by chest x-ray, a biopsy or autopsy, by presumption under §§ 718.304, 718.305. or 718.306, or if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that the miner suffers from pneumoconiosis as defined in § 718.201.[9] 20 C.F.R. § 718.202(a). Pneumoconiosis is defined in § 718.201 as a chronic dust disease arising out of coal mine employment. It is within the administrative law judge's discretion to determine whether a physician's conclusions are adequately supported by documentation. *Lucostic v. United States Steel Corp*., 8 B.L.R. 1-46, 1-47 (1985). "An Administrative Law Judge may properly consider objective data offered as documentation and credit those opinions that are adequately supported by such data over those that are not." *See King v. Consolidation Coal Co*., 8 B.L.R. 1-262, 1-265 (1985).

X-ray Evidence

In Mr. Ward's previous claims, the evidence consisted of four x-rays and five interprettations. *Ward,* 95-BLA-1666 at p. 5. Three of the five interpretations were positive for pneumoconiosis and two were negative. These x-rays, taken in 1981, 1994 and 1996, predate the newly submitted x-rays from 2001 and 2003. The newly submitted evidence, comprised of three x-rays and six interpretations, evenly divides the number of positive and negative interpretations.

Initially, I note the age of the initial x-ray evidence precludes the accord of much weight where the old x-rays are eight to twenty-two years older than the May 20, 2003 x-ray recently submitted. I grant greater probative weight to the most recent x-rays and to x-ray interpretations

[9] Only the X-ray evidence and the physicians' opinions are applicable under these facts. Section 718.202(a)(2) is inapplicable herein because there are no biopsy or autopsy results. Section 718.202(a)(3) provides that pneumoconiosis may be established if any one of the several presumptions is found to be applicable. In the instant case, Section 718.304 does not apply because there is no x-ray, biopsy, autopsy or other evidence of large opacities or massive lesions in the lungs. Section 718.305 is not applicable to claims filed after January 1, 1982. Section 718.306 is applicable only in a survivor's claim filed prior to June 30, 1982.

of dually-qualified physicians, both board-certified and B-readers, over those who are only B-readers or who have no specific radiographic qualifications. *Woodward v. Director, OWCP*, 991 F.2d 314, 316 n.4 (6th Cir. 1993).

The newly submitted x-ray dated July 21, 2001, interpreted by Dr. Gaziano and rebutted by Dr. Wiot, differs in interpretations with Dr. Gaziano' finding the x-ray positive, 1/0, for pneumoconiosis and Dr. Wiot negative. (DX 14, EX 13). Dr. Wiot's qualifications entitle his interpretation to greater probative weight than that of Dr. Gaziano's a B-reader interpretation. Consequently, I find this x-ray negative for pneumoconiosis.

Three physicians interpreted the May 20, 2003 x-ray, one B-reader and two dually-qualified readers. (CX 3, EX 23). Both of the readers with superior qualifications interpreted the x-ray as positive for pneumoconiosis. (CX 3). The board-certified, non B-reader, Dr. Spitz, read the film as negative. I find, under *Woodward,* the positive readings of the dually-qualified readers merit probative weight.

Dr. Bellotte interpreted the remaining x-ray of October 2, 2003, as negative. As a B-reader, Dr. Bellotte's interpretation is entitled to probative weight against a finding of pneumoconiosis. However, in evaluating the x-ray evidence in its entirety, I find the most recent evidence is the most probative and therefore, I accord the negative reading from 2001, as well as the old x-ray readings, less weight than the positive readings of May 2003 and the negative reading of October 2003. Additionally, the positive x-ray of May 2003 as read by physicians with superior dual qualifications may be accorded greater weight than the October reading by a lesser qualified reader. In sum, I find that the Claimant established the presence of pneumoconiosis by positive x-ray evidence.

Remaining Elements of Entitlement

After a determination of pneumoconiosis, the Claimant must also show that he meets the remaining elements of entitlement in order to be awarded benefits. The two remaining elements are:

1. His pneumoconiosis arose out of coal mine employment; and
2. He is totally disabled due to pneumoconiosis. 20 C.F.R. § 410.410(b); (DX 1).

Mr. Ward, employed in the Nation's coal mines for 28 years, is entitled to a rebuttable presumption that his pneumoconiosis was caused by his coal mine employment. *See* 20 C.F.R. § 718.203(b). To rebut this presumption, evidence must be presented demonstrating another cause for claimant's pneumoconiosis. *Id.* The Employer has not offered probative evidence to rebut the presumption and therefore, I find that this element is met.

Total Disability Due to Pneumoconiosis

A miner is considered totally disabled when his pulmonary or respiratory condition prevents him from performing his usual coal mine work or comparable work. 20 C.F.R. 718.204(b)(1). Under section 718.204(b)(2), there are several criteria for establishing total

disability and the applicable criteria under these facts are: by qualifying pulmonary function tests or arterial blood gas studies and by a physicians reasoned medical judgment based on medically acceptable clinical and laboratory diagnostic techniques.[10] 20 C.F.R. 718.204(b)(2)(i) and (iii). I must first evaluate the evidence under each subsection and then weigh all of the probative evidence together, both like and unlike, to determine whether claimant has established total respiratory disability by a preponderance of the evidence. *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1987).

Pulmonary Function Tests

All pulmonary function study evidence must be weighed including testing done both pre- and post-bronchodilator administration. *Sturnick v. Consolidation Coal Co.*, 2 B.L.R. 1-972 (1980), *Coen v. Director, OWCP*, 7 B.L.R. 1-30 (1984). However, little or no weight may be accorded to a ventilatory study where the miner exhibited "poor" cooperation or comprehension. *Houchin v. Old Ben Coal Co.*, 6 B.L.R. 1-1141 (1984). To be qualifying, the FEV_1 as well as the MVV or FVC values must equal or fall below the applicable table values. *Tischler v. Director, OWCP*, 6 B.L.R. 1-1086 (1984). I must determine the reliability of a study based upon its conformity to the applicable quality standards, *Robinette v. Director, OWCP*, 9 B.L.R. 1- 154 (1986), and must consider medical opinions of record regarding reliability of a particular study. *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986).

In assessing the reliability of a study, I may accord greater weight to the opinion of a physician who reviewed the tracings. *Street v. Consolidation Coal Co.*, 7 B.L.R. 1-65 (1984). Because tracings determine the reliability of a ventilatory study, a study that is not accompanied by three tracings may be discredited. *Estes v. DirDirector, OWCP*, 7 B.L.R. 1-414 (1984). If three tracings accompany a study, then I may presume that the study conforms unless the party challenging conformance submits a medical opinion in support thereof. *Inman v. Peabody Coal Co.*, 6 B.L.R. 1-1249 (1984).

Turning to the evidence, neither the old evidence or the newly submitted evidence produced valid qualifying values and therefore, this evidence does not support a finding of total disability due to pneumoconiosis.

Arterial Blood Gas Studies

All blood gas study evidence of record must be weighed. *Sturnick v. Consolidation Coal Co.*, 2 B.L.R. 1-972 (1980). This includes testing conducted before and after exercise. *Coen v. Director, OWCP*, 7 B.L.R. 1-30 (1984); *Lesser v. C.F. & I. Steel Corp.*, 3 B.L.R. 1-63 (1981). In order to

[10] Section 718.204(b)(2)(iii) provides that a claimant may prove total disability through evidence establishing cor pulmonale with right-sided congestive heart failure. This section is inapplicable to this claim because the record contains no such evidence.

render a blood gas study unreliable, the party must submit a medical opinion that a condition suffered by the miner, or circumstances surrounding the testing, affected the results of the study and, therefore, rendered it unreliable. *Vivian v. Director, OWCP*, 7 B.L.R. 1-360 (1984).

The record contains ten arterial blood gas studies. The reports indicate no contradiction of the regulatory quality standards, and consequently, I accord each blood gas study probative weight on the issue of total disability. No study produced qualifying values. Thus, the preponderance of the arterial blood gas study evidence weighs against a finding of total disability.

Medical Summaries

Where a claimant cannot establish total disability under subparagraphs (b)(2)(i), (ii), or (iii), Section 718.204(b)(2)(iv) provides another means to prove total disability. Under this section, total disability may be established if a physician exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that a respiratory or pulmonary impairment prevents the miner from engaging in his usual coal mine work or comparable and gainful work.

The weight given to each medical opinion will be in proportion to its documented and well-reasoned conclusions. A "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). A report may be adequately documented if it is based on items such as a physical examination, symptoms and patient's history. *See Hoffman v. B & G Construction Co.*, 8 BLR 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984); *Buffalo v. Director*, OWCP, 6 BLR 1-1164, 1-1166 (1984); *Gomola v. Manor Mining and Contracting Corp*., 2 BLR 1-130 (1979). A "reasoned" opinion is one in which the underlying documentation and data are adequate to support the physician's conclusions. *See Fields, supra*. The determination that a medical opinion is "reasoned" and "documented" is for this Court to determine. *See Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc).

The record contains five physicians' opinions addressing Claimant's disabilities or impairments. (DX 1, DX 14, CX 3). Drs. Lindner and Sundaram examined Claimant in 1994 and Dr. Boes in 1996. I incorporate my previous credibility findings regarding the the reports of Dr. Rasmussen and Dr. Gaziano under this section. Where the older reports, based on examinations, objective findings and symptoms, took place some five to seven years before the most recent reports, I find that these reports are not as probative as the more recent examining reports, discussed, *supra.* Nevertheless, I will address each prior report separately to determine if it is well-reasoned, credible, and well-documented.

Dr. Linder examined Claimant in 1994, and attributed the indicated mild impairment to poor effort on the pulmonary function tests. (DX 1). Dr. Lindner believed that Mr. Ward possessed the respiratory capacity to perform his last coal mine employment and possessed no pulmonary impairments after examining the miner, performing objective testing and obtaining a history and list of symptoms. I find that Dr. Lindner’s opinion appears well-supported, credible,

and well-documented and consequently, offers some probative weight against a finding of disability due to pneumoconiosis, it is however, dated as to Claimant's current condition.

Dr. Boes, who examined and tested Claimant's pulmonary function in 1996, also found no indication of pulmonary impairment. Although Dr. Boes' qualifications and thoroughness of the examination and testing entitle his opinion to credible weight as a well-reasoned and well-documented opinion, the elapsed time prevents this opinion from overcoming the more heavily weighted opinions of the recent examining physicians who found total disability.

Lastly, Dr. Sundaram examined Claimant in December of 1994, finding him totally disabled due to shortness of breath upon limited activity. Unfortunately, Dr. Sundaram failed to support this finding with objective testing and furthermore, his opinion is not well-reasoned. I find this opinion is insufficient to establish total disability.

Turning to the evidence *in toto*, I find that the probative value of Dr. Gaziano's and Dr. Rasmussen's opinions overcome the older examinations and support a finding that Mr. Ward is totally disabled due to pneumoconiosis. Both opinions are well reasoned, well documented, supported by objective testing and include the requisite comparisons between the exertional requirements of the miner's last employment with his current respiratory impairments.

CONCLUSION

In sum, the newly submitted evidence does establish that one of the conditions of entitlement upon which the prior claim was denied; that Mr. Ward is totally disabled due to pneumoconiosis; has changed. After a review of the record in its entirety and the previous Benefits Review Board decision, the other conditions of entitlement have been met and, therefore the claim of Mr. Clyde Ward is allowed and benefits shall be awarded in accordance with the Act.

Disability Onset Date

If the claimant is a miner totally disabled due to pneumoconiosis, the claimant should be paid his or her benefits beginning with the month of onset of total disability due to pneumoco-niosis. 33 U.S.C. § 906(a), as incorporated at 30 U.S.C. § 932(a); s*ee also* 20 C.F.R. § 725.503; *Carney v. Director, OWCP*, 11 B.L.R. 1-32 (1987). Once a claimant proves entitlement to benefits, benefits should be paid commencing with the date of total disability due to pneumoco-niosis. 20 C.F.R. § 725.503 (2001). The record does not reveal the existence of a totally disabling impairment from Mr. Ward's coal mine employment prior to the date of application. Admittedly, Mr. Ward's treatment records indicate that he was disabled prior to the filing of the instant claim, however, the records failed to establish that pneumoconiosis caused a totally disabling impairment.

Consequently, I find that Mr. Ward is entitled to benefits as of the first day of the month in which he filed the instant claim, May 1, 2001.

ORDER

THEREFORE, it is ORDERED that the claim for benefits by Clyde Ward is hereby GRANTED.

Attorney's Fees

No award of an attorney's fees for services rendered to the Claimant is made herein because no application for fees has been made by Claimant's counsel. Thirty (30) days is hereby granted to counsel for the submission of an application for fees conforming to the requirements of 20 C.F.R. § 725.365 and § 725.366 of the regulations. A Service Sheet showing that service has been made to all the parties, including the Claimant, must accompany the application. The parties have fifteen (15) days following receipt of such application to file any objections. Failure to file objections within the specified time will serve as notice that the parties concur that the petition is fair and reasonable and have no objections to said petition for fees. The Act prohibits the charging of a fee in the absence of an approved application.

A

JOSEPH E. KANE
Administrative Law Judge

NOTICE OF APPEAL RIGHTS:

Any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board **within thirty (30) days** from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board, Suite 500, 800 K. Street, N.W., Washington, DC 20001-8001. 20 C.F.R. §725.481. A copy of a Notice of Appeal must also be served upon Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits, Francis Perkins Bldg., Room N-2605, 200 Constitution Avenue, N.W., Washington, DC 20210.